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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 308

WILLIAM CAMMICK WAGONER,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SEVENTH CIRCUIT AND BRIEF IN
SUPPORT THEREOF.**

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INDEX.

	PAGE
SUBJECT INDEX.	
Petition for Writ of Certiorari	1
Summary Statement of Matter Involved	2
Jurisdictional Statement	2
Questions Presented	2
Reasons Relied on for Allowance of Writ	3
Prayer for Writ	4
Brief in Support of Petition for Writ of Certiorari...	5
Opinion of Court Below	5
Jurisdiction	5
Statement of the Case	6
Specification of Errors	6
Argument	8
Summary of Argument	8
Point A	8
Point B	11

TABLE OF CASES CITED.

Edwards v. United States, 266 Fed. 848.....	6, 10, 11
Ruthenberg v. United States, 245 U. S. 480; 62 L. Ed. 414	3, 6, 10
United States v. Cook, 17 Wall 168; 21 L. Ed. 538.....	3, 6, 10
United States v. Hess, 124 U. S. 483; 31 L. Ed. 516.....	3, 6, 11

TABLE OF STATUTES CITED.

43 Stat. 938	2
28 U. S. C. A. 347	2
50 U. S. C. A. 302	9
50 U. S. C. A. 311	9

TABLE OF TEXT BOOKS CITED.

27 Am. Jur. Sect. 191, Page 736	11
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Supreme Court of the United States

OCTOBER TERM, 1944.

No.

WILLIAM CAMMICK WAGONER,
Petitioner and Appellant Below,
vs.

THE UNITED STATES OF AMERICA,
Respondent and Appellee below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Hon. Harlan F. Stone, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States.

The Petitioner, William Cammick Wagoner, respectfully petitioners this Honorable Court for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit and shows:

Summary Statement of Matter Involved.

Petitioner was indicted for failure and refusal to present himself for and to register as required by the Selective Service and Training Act of 1940 as amended (Title 50 U. S. C. A. 301 *et seq.*) (R. 1). He pleaded guilty there-

to and later, by leave of court, withdrew that plea and entered a plea of not guilty (R. 3). He elected to represent himself, although he had means to employ counsel and the court offered to appoint counsel for him which he refused (R. 3). The matter was submitted to a jury who returned a verdict of guilty (R. 29) upon which judgment was entered and Petitioner was committed to the custody of the Attorney General for imprisonment for one year and one day (R. 29). After judgment counsel was employed and within the time allowed appeal was prosecuted from said judgment to the United States Circuit Court of Appeals for the Seventh Circuit and the case there docketed January 29, 1944. The judgment was affirmed by said court June 2, 1944 in an opinion by Kerner and Minton, Circuit Judges and a dissent by Major, C. J. Petition for rehearing with supporting brief was filed and denied July 5, 1944.

Jurisdictional Statement.

The jurisdiction of this Court is invoked under Sect. 240 (a) of the Judicial Code as amended (43 Stat. 938; 28 U. S. C. A. 347) and under Rule 38 of the Revised Rules of the Supreme Court of the United States. The judgment of the Circuit Court of Appeals for the Seventh Circuit became final July 5, 1944 and this petition was filed in this Court on or before August 4, 1944. The opinion of the Circuit Court of Appeals for the Seventh Circuit has not been officially reported but is included in the record certified to this Court (R. 44).

Questions Presented.

The questions herein presented are whether an indictment charging a violation of the Selective Service and Training Act of 1940 as amended in that the accused knowingly and wilfully failed and refused to present himself

for registration and to register as by said Act required must contain allegations that the accused is a "male citizen or resident of the United States" and as such is "between the ages of 18 and 65 years" so as to constitute an offense within the purview of the Act, and

2. May material and substantial defects in an indictment which are of such a fundamental character as to make the indictment wholly invalid be cured by the evidence and verdict.

Reasons Relied on for the Allowance of the Writ.

By its opinion the Circuit Court of Appeals for the Seventh Circuit holds that an indictment charging a violation of the Selective Service and Training Act of 1940 as amended, in that the accused knowingly and wilfully failed and refused to present himself for registration and to register as by said Act prescribed need not allege that the accused is a male citizen or resident of the United States between the ages of 18 and 65 years and that if the evidence established each of the above facts the conviction must be affirmed, contrary to established principles of law as decided by this court. *United States v. Cook*, 17 Wall 168; *Ruthenberg v. United States*, 245 U. S. 480, 482 and *United States v. Hess*, 124 U. S. 483, 485.

1. The opinion of the United States Circuit Court of Appeals for the Seventh Circuit is in conflict with applicable decisions of this Court, *supra*.

2. The United States Circuit Court of Appeals for the Seventh Circuit has decided an important question of Federal Law which has not been, but should be, settled by this Court.

Conclusion.

WHEREFORE the premises considered your Petitioner respectfully prays that a writ of certiorari issue under the seal of this Court directed to the Circuit Court of Appeals for the Seventh Circuit commanding said Court to certify and send to this Court a full and complete transcript of the record and proceedings of said Circuit Court of Appeals for the Seventh Circuit had in the case numbered and entitled on its docket No. 8510, The United States of America, Plaintiff-appellee *vs.* William Cammick Wagoner, Defendant-appellant, to the end that this cause may be reviewed and determined by this Court as provided for by the Statutes of the United States, and that the judgment herein of said Circuit Court of Appeals for the Seventh Circuit be reversed by this Court and for such further relief as to this Court may seem just and proper.

WILLIAM CAMMICK WAGONER,

By JOHN D. SHOAFF,

Counsel for Petitioner.

Old First Bank Bldg.,
Fort Wayne, Indiana.

R. C. PARRISH,

ROBERT J. PARRISH,

Standard Bldg.,

Fort Wayne, Indiana,

Of Counsel.

Dated this 28th day of July, 1944.





Supreme Court of the United States

OCTOBER TERM, 1944.

No. _____

WILLIAM CAMMICK WAGONER,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinion of Court Below.

The opinion of the Circuit Court of Appeals for the Seventh Circuit has not as yet been officially reported but appears at Page 44 of the Record herein.

Jurisdiction.

1. The date of the judgment to be reviewed is July 5, 1944.
2. The Statutory provisions which is believed to sustain the jurisdiction is that the Circuit Court of Appeals for the Seventh Circuit has decided a Federal Question of Law in a way probably in conflict with applicable decisions of this Court and has decided an important question

of Federal Law which has not been, but should be settled by this Court.

3. That the Circuit Court of Appeals for the Seventh Circuit has decided that an indictment charging an accused with knowingly and wilfully failing to present himself for registration and to register pursuant to the Selective Service and Training Act of 1940 as amended (50 U. S. C. A. Sect. 301) need not allege that the accused is a male citizen or resident of the United States and is between the ages of eighteen and sixty-five years of age and that if these facts appeared in the evidence they served to cure the omission thereof in the indictment, contrary to settled principles of law.

4. The cases believed to sustain said jurisdiction are:

Ruthenberg v. United States, 245 U. S. 480; 62 L. Ed. 414.

United States v. Cook, 17 Wall 168; 21 L. Ed. 538.

United States v. Hess, 124 U. S. 483.

Edwards v. United States, (C. C. A. 4th) 266 Fed. 848.

Statement of the Case.

This has already been stated in the preceding petition at Page 1 thereof and is hereby adopted and made part of this brief.

Specification of Error.

1. The Circuit Court of Appeals for the Seventh Circuit erred in holding that an indictment charging petitioner with knowingly and wilfully failing to present himself for registration and to register as required by the Selective Service and Training Act of 1940 and as amended

(50 U. S. C. A. 301) was sufficient to charge an offense under said act and that it was not necessary to allege that petitioner was a male citizen or resident of the United States and was between the ages of eighteen and sixty-five years of age as provided in Section 302 of said Act.

2. The Circuit Court of Appeals for the Seventh Circuit erred in holding an indictment failing to allege the ingredients of a statutory offense may be cured by the evidence, if the material omissions from the indictment appear in the evidence.

ARGUMENT.

Summary of Argument.

Point A. An indictment charging an offense under the Selective Service and Training Act of 1940 as amended must bring the accused within the purview of the Act and show he is subject to the provisions thereof by proper allegation, otherwise the indictment is invalid and may be attacked for the first time on appeal.

Point B. An indictment that is fatally defective may not be cured by evidence so as to supply to the indictment omitted essentials necessary to constitute the offense alleged.

Point A.

Omitting formal parts of the indictment the same reads (R. 1):

“William Cammick Wagoner, late of said District at and in the County of Grant, State of Indiana and within the Fort Wayne Division of the Northern District of Indiana, and within the jurisdiction of this Court, on or about the 16th day of February 1942, did then and there unlawfully, knowingly, wilfully and feloniously evade registration as required by the Selective Service and Training Act of 1940, as amended, by then and there unlawfully, knowingly, wilfully and feloniously failing and refusing to present himself for and submit to registration at such time and place and in such manner as determined by the rules and regulations prescribed under said Act, as amended.”

The indictment is founded on the failure of the petitioner to comply with provisions of the Selective Service

and Training Act of 1940, as amended and Section 302 (50 U. S. C. A.) of the Act provides:

“Except as otherwise provided in this Act, it shall be the duty of every male citizen of the United States and every other male resident of the United States who, on the day or days fixed for the first or any subsequent registration, is between the ages of eighteen and sixty-five years to present themselves for and to submit to registration at such time or times and place or places, and in such manner and in such age group or groups as shall be determined by rules and regulations hereunder.”

Section 311 of the same Act, in part provides:

“Any person charged as herein provided with the duty of carrying out any of the provisions of this Act, or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty * * * or who otherwise evades registration * * * or any of the requirements of this Act * * * shall upon conviction, etc.”

It is clear from Section 302 above that only male citizens or residents of the United States between the ages of eighteen and sixty-five years of age are bound to comply with the provisions thereof.

Section 311 of the Act ordains that “any Person charged as herein provided * * * who shall knowingly fail or neglect to perform such duty * * * or who otherwise evades registration * * * shall upon conviction be punished”. The “person” mentioned in this Section of necessity is the “person” mentioned in Section 302, that is a male resident or citizen of the United States between the age group defined therein.

To charge an offense under the Act it is first necessary to show that the “person” alleged to have violated the Act is a “person” defined within the Act and in this case a male citizen or resident of the given ages. The indictment under question does not allege that petitioner is a

male person or resident of the United States nor does it allege that he is between the ages of eighteen and sixty-five years. The indictment is barren of any allegation or statement from which it may be inferred that the petitioner is in any wise subject to the Act or in any way bound to comply with its provisions.

Every male citizen or resident of the United States is not obligated to present himself for registration or to be registered. The Act does not apply to females, and there is nothing in the indictment to identify the sex of the petitioner unless the name William is sufficient for that purpose. The indictment does not allege the age of the defendant, and nothing appears therein that would furnish as much as a hint or suspicion thereof. The indictment wholly fails to bring petitioner within the operation of the Act that he is charged with violating and is therefore fatally defective, (*United States v. Cook*, 17 Wall 168; 21 L. Ed. 538) and the defect may be raised for the first time on appeal (*Edwards v. United States*, 266 Fed. 848). That the accused is a male citizen or resident of the United States and between the ages of eighteen and sixty-five years are necessary allegations in an indictment charging an offense under the Act and are matters of substance and not form is recognized by this Court in *Ruthenberg v. United States*, 245 U. S. 480, 483; 62 L. Ed. 414, 418:

“Further it is said the indictment was insufficient because it did not allege that Schue who, it was charged, refused to register, was a citizen of the United States, or was a person not an alien who had declared his intention to become such a citizen. But this overlooks the fact that although only the persons described were subject to military duty under the terms of the Act, by Section 5 ‘all male persons between the ages of twenty-one and thirty both inclusive * * * were required to register. It was sufficient to charge therefore, as the indictment did, that Schue was a male person between the designated ages.’”

Point B.

An indictment that is fatally defective may not be cured by evidence so as to supply to the indictment omitted essentials necessary to constitute the offense alleged.

In 27 Am. Jur. Sect. 191, Page 736 the rule is expressed:

“It is well settled that a verdict will not cure a failure to allege a criminal offense or the omission of any essential allegation; any such objection is fatal after as well as before verdict.”

In *United States v. Hess*, 124 U. S. 483, 485 it was held:

“It must be held that the second count of the indictment before us does not sufficiently describe an offense within the statute. The essential requirement, indeed all the particulars constituting the offense of devising a scheme to defraud, are wanting. Such particulars are matters of substance and not of form and their omission is not aided or cured by the verdict.”

And to the same effect is the case of *Edwards v. United States*, 266 Fed. 848, 850:

“This would seem eminently proper, because if it appears that no crime was charged in the indictment it must follow that the verdict of guilty is no broader than the charge, and does not import any crime whatever, and consequently there is nothing to support the judgment.”

Conclusion.

WHEREFORE, your Petitioner respectfully prays that a writ of certiorari be issued under the seal of this Court directed to the United States Circuit Court of Appeals for the Seventh Circuit commanding that Court to certify and send to this Court for its review and determination a full and complete transcript of the record and proceedings in the case Numbered 8510 and entitled on its docket, The

United States of America, plaintiff-appellee *vs.* William Cammick Wagoner, defendants-appellant, and that the said judgment of the Circuit Court of Appeals for the Seventh Circuit may be reversed and for such other and further relief as to this Court may seem meet and proper.

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TELEGRAM

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No. 808

Just the Supreme Court of the United States

OCTOBER TERM, 1944

WILLIAM OAKMICK WAGONER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE ELEVENTH
CIRCUIT

REPLY FOR THE UNITED STATES IN OPPOSITION

INDEX

	<i>Page</i>
Opinion below.....	1
Jurisdiction.....	1
Question presented.....	2
Statute involved.....	2
Statement.....	4
Argument.....	6
Conclusion.....	9

CITATIONS

Cases:

<i>Bersio v. United States</i> , 124 F. (2d) 310, certiorari denied, 316 U. S. 665.....	7
<i>Durland v. United States</i> , 161 U. S. 306.....	8
<i>Glasser v. United States</i> , 315 U. S. 60.....	8
<i>Hagner v. United States</i> , 285 U. S. 427.....	7, 8
<i>Holmgren v. United States</i> , 217 U. S. 509.....	8
<i>Hopper v. United States</i> , 142 F. (2d) 181.....	7
<i>Lamar v. United States</i> , 241 U. S. 103.....	7
<i>Moore v. United States</i> , 56 F. (2d) 794.....	8
<i>Ruthenberg v. United States</i> , 245 U. S. 480.....	8, 9
<i>Sykes v. United States</i> , 264 Fed. 945, certiorari denied, 254 U. S. 655.....	8
<i>United States v. Goldsmith</i> , 108 F. (2d) 917, certiorari denied, 309 U. S. 678.....	7
<i>United States v. Lepowitch</i> , 318 U. S. 702.....	7
<i>United States v. Polakoff</i> , 112 F. (2d) 888, certiorari denied, 311 U. S. 653.....	8
<i>United States v. Wernecke</i> , 138 F. (2d) 561, certiorari denied, 321 U. S. 771.....	7

Statutes:

Selective Draft Law of 1917.....	9
Selective Training and Service Act of 1940, 54 Stat. 885, as amended (50 U. S. C. App. 301 et seq.):	
Sec. 2.....	2
Sec. 11.....	3, 6
Sec. 14.....	4
18 U. S. C. 556.....	9

Miscellaneous:

President's Proclamation of January 5, 1942 (7 F. R. 177),	
See, 2 (a).....	2, 5, 6



In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 308

WILLIAM CAMMICK WAGONER, PETITIONER
v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH
CIRCUIT*

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The majority (R. 44-47) and dissenting (R. 47-49) opinions in the circuit court of appeals have not yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered June 2, 1944 (R. 49), and a petition for rehearing was denied July 5, 1944 (R. 50). The petition for a writ of certiorari was filed July 31, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Whether the indictment, based on Section 11 of the Selective Training and Service Act and charging petitioner with the offense of evading registration as required by the Act, is sufficient to support petitioner's conviction.

STATUTE INVOLVED

The Selective Training and Service Act of 1940, 54 Stat. 885, as amended (50 U. S. C. App. 301 et seq.) provides in pertinent part as follows:

SECTION 2. Except as otherwise provided in this Act, it shall be the duty of every male citizen of the United States, and of every other male person residing in the United States, who, on the day or days fixed for the first or any subsequent registration, is between the ages of eighteen and sixty-five, to present himself for and submit to registration at such time or times and place or places, and in such manner and in such age group or groups, as shall be determined by rules and regulations prescribed hereunder.

* * * * *

SECTION 11. * * * any person who shall knowingly make, or be a party to the making of, any false statement or certificate as to the fitness or unfitness or liability or nonliability of himself or any

other person for service under the provisions of this Act, or rules, regulations, or directions made pursuant thereto, or who otherwise evades registration or service in the land or naval forces or any of the requirements of this Act, * * * or of said rules, regulations, or directions, * * * or who in any manner shall knowingly fail or neglect to perform any duty required of him under or in the execution of this Act, or rules or regulations made pursuant to this Act, * * * shall, upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than five years or a fine of not more than \$10,000, or by both such fine and imprisonment, * * *.

* * * * *

SECTION 14. (a) Every person shall be deemed to have notice of the requirements of this Act upon publication by the President of a proclamation or other public notice fixing a time for any registration under section 2.¹

¹ Section 2 (a) of the President's Proclamation of January 5, 1942 (7 F. R. 177), provides in part as follows:

"Every male citizen of the United States, and every other male person residing in the continental United States * * * other than persons excepted by Section 5 (a) of the Selective Training and Service Act of 1940, as amended, and by Section 208 of the Coast Guard Auxiliary and Reserve Act of 1941, is required to and shall on February 16, 1942, present himself for and submit to registration before a duly designated registration official or selective service local board having jurisdiction in the area in which he has his permanent

STATEMENT

On February 27, 1942, petitioner was indicted in the United States District Court for the Northern District of Indiana for violation of Section 11 of the Selective Training and Service Act of 1940, as amended. The indictment charged that petitioner "on or about the 16th day of February, 1942, did then and there unlawfully, knowingly, wilfully and feloniously evade registration as required by the Selective Training and Service Act of 1940, as amended, by then and there unlawfully, knowingly, wilfully and feloniously failing and refusing to present himself for and submit to registration at such time and place and in such manner as determined by the rules and regulations prescribed under said Act, as amended" ² (R. 1-2).

Prior to his trial petitioner advised the court that he was able to employ counsel (R. 3) but that he did not desire representation by an attorney and that he did not want the court to

home or in which he may happen to be on that day if such male citizen or other male person on December 31, 1941, has attained the twentieth anniversary of the day of his birth and on February 16, 1942, has not attained the forty-fifth anniversary of the day of his birth, and has not heretofore been registered under the Selective Training and Service Act of 1940 and the regulations thereunder: * * *

² On April 13, 1942, petitioner pleaded guilty to the charge of the indictment (R. 2), but on January 3, 1944, after several continuances of the case (R. 2), the district court permitted him to withdraw his plea of guilty and to enter a plea of not guilty (R. 3).

appoint counsel for him since "for Scriptural reasons" he desired to defend himself (R. 6). Petitioner did not challenge the sufficiency of the indictment. When the case was called for trial, the court found that petitioner knowingly and intelligently waived his right to be represented by counsel and the case thereafter proceeded to trial before a jury with petitioner representing himself (R. 6).

The Government's proof showed that on the day for registration, February 16, 1942,³ petitioner was forty years of age, having been born in Marion, Indiana, on September 19, 1901 (R. 8, 9, 14), and he resided in Grant County, Indiana, within the jurisdiction of Local Board No. 2, Grant County, Indiana (R. 7). Petitioner knew that he was required to register on February 16, 1942, as required by the Act and the President's Proclamation, but instead of doing so, he mailed a letter to his local board on that date in which he stated, *inter alia*, that "as a Christian under the leadership of the Holy Spirit I can not register; and so I am informing you of my situation in advance" (R. 8). Petitioner did not register at any time thereafter, although he was accorded a further opportunity to do so on February 21, 1942 (R. 10, 14). The jury found petitioner guilty and he was sentenced to imprison-

³ See the President's Proclamation of January 5, 1942 (footnote 1, *supra*, p. 3).

ment for one year and one day (R. 29). On appeal the judgment was affirmed, one judge dissenting (R. 44-49).

ARGUMENT

Petitioner contends (Pet. 9-11) that the failure of the indictment specifically to allege that he was a male citizen or resident between the ages of 20 and 45 was an omission of an essential element of the offense and for that reason the indictment was open to attack for the first time in the court below.⁴ This contention, we submit, is without substance.

Section 11 of the Selective Training and Service Act of 1940 makes it an offense, *inter alia*, for any person to evade registration under the Act (*supra*, p. 3). In accordance with the terms of the statute the indictment (*supra*, p. 4) charged that petitioner (1) knowingly (2) evaded registration (3) as required by the Act, in that he did not register in the manner provided by the rules and regulations issued under the Act. The indictment, in the language of the statute, plainly meets the applicable test, i. e., whether it sets forth the essential elements of the offense with sufficient definiteness and certainty to apprise the

⁴ Petitioner asserts that the indictment should have alleged that he was a male citizen or male person residing in the United States between the ages of 18 and 65; under the President's Proclamation of January 5, 1942 (footnote 1, *supra*, p. 3), the duty of registration on February 16, 1942, extended to such persons between 20 and 45 years of age.

defendant of the crime charged and to protect him against further prosecution for the same offense. Cf. *United States v. Lepowitch*, 318 U. S. 702, 704; *Hagner v. United States*, 285 U. S. 427, 431-433; *Lamar v. United States*, 241 U. S. 103, 116; *Hopper v. United States*, 142 F. (2d) 181, 184 (C. C. A. 9); *United States v. Wernecke*, 138 F. (2d) 561 (C. C. A. 7), certiorari denied, 321 U. S. 771; *Bersio v. United States*, 124 F. (2d) 310, 314 (C. C. A. 4), certiorari denied, 316 U. S. 665; *United States v. Goldsmith*, 108 F. (2d) 917, 920-921 (C. C. A. 2), certiorari denied, 309 U. S. 678.⁵ Petitioner's contention that an element of the offense was not charged overlooks the fact that the indictment specifically alleged that he evaded the registration required of him by the Act. Implicit in this allegation is a charge that petitioner was a member of the class of persons required to register under the Act, as implemented

⁵ The obligation to register under the Selective Training and Service Act is so well understood and the requirements have been so widely publicized, that a charge of failing to register cannot be said to be subject to any reasonable probability of misinterpretation or uncertainty. Under no fair interpretation might it be claimed that petitioner, charged with evasion of registration in the language of the statute, was placed at any disadvantage in preparing or making any defense that he might have had. And the record demonstrates that petitioner was fully aware of his obligation to register on February 16, 1942, for on that day, instead of appearing for registration, he wrote to his local board that he could not register "as a Christian under the leadership of the Holy Spirit" (R. 10).

by authorized regulations, that is, a male person between the ages of 20 and 45. While these facts might appropriately have been made more explicit in the indictment, we submit that the failure to do so did not amount to a failure to allege an element of the offense proscribed by Section 11. As a practical matter, if petitioner desired greater specificity in respect of this element of the offense he might properly have secured the information by a motion for a bill of particulars. *Glasser v. United States*, 315 U. S. 60, 66; *United States v. Polakoff*, 112 F. (2d) 888, 890 (C. C. A. 2), certiorari denied, 311 U. S. 653.⁶ Having failed to make such a motion or to object to the indictment at any stage of the trial, petitioner is not now in a position to urge that his conviction should be overturned because of the failure of the indictment to describe the offense in greater detail. *Hagner v. United States*, 285 U. S. 427, 433; *Holmgren v. United States*, 217 U. S. 509, 523; *Durland v. United States*, 161 U. S. 306, 315; *Moore v. United States*, 56 F. (2d) 794 (C. C. A. 10); *Sykes v. United States*, 264 Fed. 945 (C. C. A. 9), certiorari denied, 254 U. S. 655.⁷ Since the indictment

⁶ Since petitioner intelligently and competently waived representation by counsel, the fact, suggested by the dissenting judge below (R. 49), that petitioner may not have known of the motion for a bill of particulars does not avail him now.

⁷ *Ruthenberg v. United States*, 245 U. S. 480, upon which petitioner relies (Pet. 10), is not authority for the proposition that the indictment was required to allege that petition-

alleged all of the elements of the offense and petitioner has made no showing that he suffered any prejudice from the lack of specificity of which he complains, 18 U. S. C. 556,⁸ as the court below stated (R. 46), requires that the judgment of conviction shall remain undisturbed.

CONCLUSION

The decision below is correct and the case presents no conflict of decisions or question of general importance. We therefore respectfully

tioner was a male person between the designated ages. In that case one of the plaintiffs in error challenged his conviction for failure to register under the Selective Draft Law of 1917 on the ground that the indictment was insufficient because it failed to allege that he was a citizen of the United States or a person not an alien enemy who had declared his intention to become a citizen. This Court rejected the contention, pointing out that although these persons were the only ones subject to military duty under the Act, "all male persons between the ages of twenty-one and thirty, both inclusive (with certain exceptions not here material), were required to register" (245 U. S. at 483). It held that it was sufficient to charge that plaintiff in error was a male person between the designated ages (*ibid.*). However, the question whether the indictment would have been fatally defective if it had failed to allege the age and sex of the plaintiff in error was not before the Court.

⁸ That statute provides in pertinent part:

"No indictment found and presented by a grand jury in any district or other court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant, * * *."

submit that the petition for a writ of certiorari should be denied.

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AUGUST 1944.

